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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

No. 73

■
NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

■
**Motion for Leave to Amend Petition
for Writ of Certiorari, or, in the
Alternative, to be Permitted to Argue
Certain Issues Before the Court**

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MAY IT PLEASE THE COURT:

Now comes the petitioner and moves the Court for leave to amend the petition for writ of certiorari so as to clarify the questions presented, or, in the alternative, for permission to brief and argue certain questions upon final hearing.

The underlying question presented in this case is: Can a defendant indicted and charged with violating the Selective Training and Service Act of 1940 for failure to report for induction as directed by a local board urge as a defense to the indictment that he was a minister of religion exempt from service, that the board had no jurisdiction and that the indictment based on the board's order is void?

This question was presented to the trial court by offers of proof, motion for dismissal at the close of the govern-

ment's case, objections to the charge of the court to the jury, and the requested issues. (R. 20, 30-31, 71-79, 6) The same question and the incidental questions based thereon were duly urged by assignments of error timely filed in the Circuit Court of Appeals. (R. 89-99) Rulings of the trial and appeal courts were based upon the proposition that the illegality of the local board's order is not available as a defense. *United States v. Grieme*, 128 F. 2d 811.

In the petition for writ of certiorari certain questions are presented. Questions 1, 2 and 9 raise the incidental question as to rulings on the evidence. Question number 7 raises the incidental question as to the court's charge. Question number 8 raises the incidental question as to the requested charges refused by the court. Questions numbers 4, 5, 6 and 10 present the general proposition of the action of the trial court in denying the defense. These last mentioned questions properly ought to permit consideration by this Court of the following additional questions:

(11) Does the undisputed evidence show petitioner is not guilty because petitioner is exempt by Act of Congress from duty or service thereunder?

(12) Did the trial court commit reversible error in overruling petitioner's motion to dismiss filed at the close of the government's case?

(13) Should this Court reverse, set aside the verdict, and dismiss the indictment or in the alternative order a new trial because the petitioner is not guilty?

These three questions ought properly to be allowed and considered by the Court because they are impliedly raised by questions numbers 4, 5 and 6 in the petition. Questions 11 and 13 should be permitted because in a criminal case if the record shows the accused is not guilty, or as a matter of law the government has failed to make a case against the defendant, this Court can *sua sponte* consider the question and reverse the judgment. This was done in *Sibbach v. Wilson & Co.*, 312 U. S. 1, 16. See also *Wiborg v. United*.

States, 163 U. S. 632, 659; *Weems v. United States*, 217 U. S. 349, 362; *Mahler v. Eby*, 264 U. S. 32, 45; and *Kessler v. Stricker*, 307 U. S. 22, 34.

These questions, together with question number 12, should be considered because they do not present a new issue or problem to the Court for consideration. Each question is incidental to the determination of the specific and general questions presented in the petition. *Rorock v. Devon Syndicate*, 307 U. S. 299, 303. The issue of the right to urge the defense to the indictment remains with the Court even if the questions are not allowed.

Question number 12 should be permitted. The motion for dismissal presented at the close of the government's case was not waived by the subsequent proceedings.

The evidence subsequently offered did not aid or strengthen the government's case. Exhibit C confirmed what was shown in the questionnaire introduced by the government, to wit, that petitioner was exempt as a minister. (Government's Exhibit 2) There was no evidence subsequently introduced which made a jury question. There is no need to apply the rule of waiver here by failure to renew the motion at the close of the evidence. After the government rested, almost the entire proceedings were offers of proof to complete bills of exception on evidence excluded by the court, which rulings were based on *United States v. Grieme*, supra. The rule of waiver of motion to dismiss for failure to renew at the close of the case should not apply because it is not necessary to permit the evidence to be reviewed. We do not urge the insufficiency of the evidence, but it is urged that there is *no evidence* to sustain the verdict because the undisputed and government's evidence shows that petitioner is a minister exempt from duty under the Act. In the circumstances a gross injustice would result if the Court does not review the evidence. *Smith v. United States*, 150 U. S. 50; *Wiborg v. United States*, supra; *Weems v. United States*, supra; *Sibbach v. Wilson & Co.*, supra; *Mahler v.*

Eby, supra; and *Kessler v. United States, supra*. See also Rule 37 of this Court.

Petitioner's requested charges to the jury, objections to the court's charge and the assignments based thereon present the same question as that which we ask to urge upon all the evidence before the Court under these questions. See Questions 7 and 8 of Petition. Permitting the amendment will facilitate the presentation of all the related and incidental questions.

A copy of this motion has been duly served upon the Solicitor General in the manner required by the rules of this Court.

WHEREFORE petitioner prays that the Court permit the petition to be amended so as to allow the three above questions to be added; or, in the alternative, upon final hearing petitioner be permitted to discuss in the brief and upon oral argument that, as a matter of law, he was exempt from duty of training and service under the Act, and accordingly the local board had no jurisdiction and that the indictment based thereon was void. Petitioner prays for such other and further relief to which he may show himself justly entitled upon a determination hereof.

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